UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

01-CR-247E

v.

BENAMAR BENATTA,

Defendant.

REPORT, RECOMMENDATION AND ORDER

Pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), all pretrial matters in this case have been referred to the undersigned by the Hon. John T. Elfvin.

PRELIMINARY STATEMENT

The defendant is charged in a two-count indictment with having violated 18 U.S.C. § 1028(a)(6), possession of a false United States identification document, to wit, a social security card (Count 1) and 18 U.S.C. § 1546, possession of a forged, counterfeited or falsely made and fraudulently procured U.S. Alien Registration Receipt Card. He has filed an omnibus motion wherein he seeks extensive discovery, suppression of evidence and dismissal of the indictment. The government responded to the motion in a timely fashion and thereafter, the defendant filed supplemental papers in support of his motion. The government filed additional responses to these supplemental filings by the defendant. For reasons that will be explained in the

recitation of facts, the Court directed the government to produce and submit certain materials to the Court for an *in camera* inspection. Such an inspection was conducted by the Court on February 12, 2003 and an Order issued on February 13, 2003 wherein and whereby certain of the materials produced by the government were ordered to remain sealed and not produced as discovery materials to the defendant, and the remainder of the materials produced by the government for inspection were ordered to be delivered to the defendant. *See* Docket #29.

Additional supplemental filings and responses thereto were thereafter filed by counsel for the defendant and the government, and oral argument on all of the issues raised therein was heard by this Court on May 28, 2003 and the matter taken under advisement on that date.

Those matters over which I have dispositive jurisdiction pursuant to 28 U.S.C. § 636(b)(1)(A) will be addressed in a separate Decision and Order, and this Report, Recommendation and Order will address only the issues relating to suppression of evidence and dismissal of the indictment.

FACTS

The defendant is a citizen of Algeria who had originally entered the United States "as a nonimmigrant B-1 visitor on December 31, 2000 with an authorization to remain in the United States until June 30, 2001." (*See* Declaration of

Michael D. Rozos dated January 16, 2003, Docket #24). The purpose of his visit was educational. The defendant is an avionics technician, and at the time of his original entry, he was a member of a group of Algerian Air Force personnel who were to receive aviation training at a Northrup/Grumann training facility. The defendant completed this scheduled training program, but remained in the United States allegedly for the purpose of seeking political asylum and obtaining employment in this country. However, because his visa had expired and he had not obtained employment in the United States, the defendant attempted to enter Canada and apply for asylum in that country on or about September 5, 2001. Upon his entry, the defendant was detained by Canadian authorities apparently for investigatory purposes. As a result of the horrific events of September 11, 2001, the Canadian authorities alerted United States authorities of defendant's presence and profile as set forth above and returned him to the United States authorities on September 12, 2001 by transporting him across the Rainbow Bridge in Niagara Falls and turning him over to the custody of United States Immigration Officers pursuant to "The Reciprocal Arrangement Between The United States Immigration And Naturalization Service, Department of Justice And The Canada Employment And Immigration Commission For the Exchange Of Deportees Between The United States And Canada" dated July 24, 1987. (*See* Exhibit A attached to the defendant's "Supplemental Affidavit In Support of Motion To Suppress Evidence And To Dismiss Indictment," Docket #21). The defendant was taken into custody on September 12, 2001 by representatives of the U.S. Immigration and Naturalization Service ("INS") and detained in the INS office at the Rainbow Bridge port of entry located in Niagara Falls, New York in the Western District of New York ("WDNY"). While being detained

there, the defendant was interviewed by Special Agent Culligan and Special Agent Paul Bellito of the Federal Bureau of Investigation ("FBI"). As alleged by the government, the defendant was advised of his rights and then interrogated by the FBI agents about the alleged false identification found on him. "The INS charged the defendant as removable as an alien who had remained in the United States longer than authorized and accordingly served a Notice to Appear placing him into immigration proceedings" and "on September 13, 2001, the INS commenced a removal proceeding against defendant in the Batavia Immigration Court at the Batavia Federal Detention Facility (BFDF)" and the "defendant was taken to the BFDF for detention by the INS during his removal proceedings." (Declaration of Michael D. Rozos dated January 16, 2003, ¶¶ 7 and 8, Docket #24). Apparently the INS Notice to Appear served on the defendant required his appearance in the Immigration Court in Batavia, New York at the BFDF on September 25, 2001. (*See* Supplemental Affidavit In Support of Motion sworn to by Joseph B. Mistrett, A.U.S.P.D. on November 19, 2002, ¶ 8(d), Docket #21). For reasons that were never expressly made known, and before the defendant ever had an opportunity to confer with counsel or to be represented by counsel, he was spirited off to the Metropolitan Detention Center in Brooklyn, New York ("MDC Brooklyn") by the U.S. Marshal Service ("USMS") on September 16, 2001. The MDC Brooklyn is a facility operated under the jurisdiction of the Bureau of Prisons ("BOP"). At the time that this "tranfer" took place, no motion for a change of venue had been filed by the INS nor had any order authorizing a change of venue been issued by an Immigration Judge ("IJ"). Thereafter, well after the fact, the INS filed a motion on September 21, 2001 seeking a change of venue for defendant's removal hearing from the Batavia Immigration Court to

the Immigration Court at Varick Street, New York, New York. This notice of motion was allegedly served on the defendant on September 21, 2001 while he was apparently being detained at "MDC, NY".[1] (*See* Exhibit A attached to the Declaration of Michael D. Rozos dated January 16, 2003, Docket #24). At this time, the defendant still had not retained counsel nor did he have access to counsel. Further, as admitted by Michael D. Rozos in his Declaration, there are no documents "discussing the rationale for a change of venue." *(See* Docket #24, ¶ 13). Notwithstanding this fact, John B. Reid, I.J. ordered a change of venue to "NYD" on October 4, 2001 and curiously states that the defendant's "new address is c/o INS, 201 Varick St., New York, N.Y. 10014"[2] when

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[1] There appears to be a discrepancy as to where the defendant was being housed after September 13, 2001. As previously stated, Michael D. Rozos, Director, Removals Division of the Immigration and Naturalization, declared that the defendant had been transferred to MDC Brooklyn. The certificate of service attached to the INS change of venue motion states that the defendant was personally served "at MDC, N.Y. on 9/21/01" which is an INS Processing Center located at 201 Varick Street, New York City, New York. The Affidavit of Assistant United States Attorney Marc Gromis sworn to August 28, 2002 states that the defendant "was in INS custody at the MDC Brooklyn". Exhibit C attached to Docket #21. The government's motion by immigration attorney Mark P. Murphy states in paragraph 3 thereof: "[T]he respondent was transferred from the Buffalo (sic) Federal Detention Facility to the Metropolitan Correctional Facility in New York, New York and is now in the jurisdiction of the New York, New York Immigration Court at Varrick Street." (*See* Exhibit A attached to Declaration of Michael D. Rozos which is attached as Exhibit A to the Affirmation of Joseph B. Mistrett dated April 11, 2003, Docket #34). The transcript of the immigration proceedings conducted on December 12, 2001 establishes that they were held "at the Immigration Court holding hearings at Metropolitan Detention Center in Brooklyn, New York." (*See* Exhibit H attached to the Affirmation of Joseph B. Mistrett dated April 11, 2003, Docket #34).

[2] This discrepancy of defendant's location during the time period of September 17, 2001 to April 2002 is further compounded by the statement contained in the Order of the Board of Immigration Appeals ("BIA") dated July 31, 2002 wherein it is stated: "The Board's order was mailed to respondent at his last known address Metropolitan Detention Center, 100 29th Street, Brooklyn,
New York 11232 . . . ." *See* Exhibit E attached to Docket #24 - Declaration of Michael
(continued...)

apparently the defendant continued to be detained at MDC Brooklyn. A further discrepancy appears wherein I.J. Reid's October 4, 2001 order states that "The Immigration Court having administrative control over this hearing location is **201 Varick Street, Room 1140, New York, N.Y. 10014**," (emphasis added), whereas Michael D. Rozos states in his Declaration dated January 16, 2003 that the "Defendant was thereafter afforded several hearings before an Immigration Judge (IJ) at the **MDC Brooklyn Immigration Court**." (emphasis added). (*See* Exhibit B attached to the Declaration of Michael D. Rozos and paragraph 14 in said Declaration - Docket #24). Exhibit D attached to the Supplemental Affidavit of Joseph B. Mistrett sworn to November 19, 2002 establishes that the defendant "entered special housing" ("SH") on "9-17-01" as a "high security status" in MDC Brooklyn and was kept there until sometime in April 2002. *(See* Docket #21).

Once placed in SH, the defendant "was thereafter afforded several hearings before an Immigration Judge (IJ) at the MDC Brooklyn Immigration Court" and "in his removal proceedings, defendant designated Canada as his chosen country of removal." (Declaration of Michael D. Rozos dated January 16, 2003, paragraph 14, Docket #24). The removal hearing was completed on December 12, 2001 and an order of removal was issued by the IJ directing that the defendant be removed from the United States to Canada, or in the alternative, to Algeria. Defendant's application for asylum was also denied by the IJ in this order of removal. (*See* Exhibit F attached to

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[2](...continued)
D. Rozos dated January 16, 2003.

Docket #21).

While in custody at the MDC Brooklyn, the defendant was interrogated on a number of occasions by FBI agents assigned to the FBI's Terrorist Task Force in the context of his ethnic and religious background, his citizenship and his Algerian Air Force status and the events of September 11, 2001. FBI 302 reports were prepared reflecting these interrogations.[3]

Investigation of the defendant at this time was apparently being conducted under the auspices of the Terrorist and Violent Crimes Section of the Department of Justice ("TVCS") and as a result, "the U.S. Attorney's Office [W.D.N.Y.] was required to notify TVCS and obtain its authorization before filing charges against [the defendant]." The government asserts that "the U.S. Attorney's Office [W.D.N.Y.] was, by October 29, 2001, prepared to file charges in this case" either "by complaint or indictment" but that "authorization to file charges" had not been "received from TVCS [until] November 16, 2001" and "the U.S. Attorney's Office decided to proceed by indictment." (*See* Government's Reply Statement In Response To Defendant's Affirmation In Support Of Dismissal, Docket #35, pp. 4, 5).

[3] The defendant moved for production of these 302 reports, and the government objected to such production based on matters of relevancy and security. These reports were reviewed by the Court *in camera* and some were ordered to be produced and the remainder were found not to be relevant to this case and were ordered sealed. *See* Docket #29.

On December 12, 2001, the indictment in this action was returned by the grand jury sitting in Buffalo, New York. (*See* Docket #1). This Court accepted the return of the indictment on December 12, 2001 and issued a warrant for the arrest of the defendant on that date at the request of the government. Notwithstanding the return of this indictment and the issuance of the arrest warrant and the fact that the defendant was in the custody of the government, the defendant was kept in the MDC Brooklyn until April 30, 2002 when he was finally transferred from MDC Brooklyn to the BFDF by the USMS and has been detained at the BFDF to date. The defendant was **not** arraigned on the present indictment until April 30, 2002 when he appeared before this Court for that purpose.

In its attempt to explain and justify why the defendant was not returned to the WDNY for arraignment on the December 12, 2001 indictment until April 30, 2002, the government states by way of the Affidavit of former Assistant United States Attorney Marc Gromis, sworn to August 28, 2002, that he "provided a copy of the [arrest] warrant to the INS case agent in Buffalo, Larry Krug, and asked him to lodge it as a detainer against the defendant, who was in custody at the Metropolitan Detention Center in Brooklyn in the Eastern District of New York." Gromis "did not immediately commence action to bring the defendant to Buffalo" because he "had been informed by the INS that the defendant was involved in INS removal proceedings at that time in New York City." (Docket #13, ¶¶ 4 and 5). However, the defendant's removal hearing concluded on December 12, 2001, and the IJ issued an order of removal on that date wherein the defendant was ordered removed "to Canada or, in the alternative, to Algeria." (*See*

Docket #24, ¶ 14 and Exhibit C attached thereto). On January 4, 2002, Gromis "sent an e-mail to Jonathan Sack, the Criminal Chief in the Eastern District of New York . . . requesting the assistance of that office to commence proceedings to 'writ' the defendant out of INS custody and bring him in front of a Magistrate Judge there for Rule 40 proceedings." (*See* Docket #13, ¶ 6). However, the defendant was **not** "taken without unnecessary delay before the nearest federal magistrate judge" (Rule 40, Federal Rules of Criminal Procedure) ("Fed. R. Crim. P.") as requested by Gromis. Instead, Assistant United States Attorney Sack advised Gromis by e-mail on January 8, 2002 that he had "referred the matter to Andrew Hinton, Chief of Intake" and "indicated that a 'removal complaint' might have to be prepared in that district."[4] (*See* Docket #13, ¶ 7 and attached e-mail printouts to the affidavit of Gromis). For reasons, if any, that have not been adequately explained by the government, no further action was taken in this case until March 8, 2002, two months after the Sack e-mail of January 8, 2002, when Assistant United States Attorney Hinton e-mailed Gromis advising him that he had received the January 8, 2002 e-mail forwarded by Sack regarding a Rule 40 proceeding as to the defendant. He further advised that when he "called [his] Marshal Service to start the process, they (sic) suggested that [Gromis] have [the defendant] writted from MDC directly to WDNY." This position of the USMS is directly contrary to this Court's

[4] This statement seems contradictory to the position put forth by the government in response to the defendant's motion, to wit, that since the defendant was in INS custody, he could be removed to any facility chosen by INS which is what was done when the defendant was removed from BFDF to MDC Brooklyn on September 16, 2001 without any court order or "removal complaint." Accepting the government's argument, INS could have easily returned the defendant to the BFDF just as it moved him from that facility to MDC Brooklyn.

command as set forth in the Warrant for Arrest issued by this Court on December 12, 2001 (Docket #40), the receipt of which was acknowledged by the INS on December 12, 2001 wherein "the USM and any Authorized United States Officer" is "COMMANDED to arrest BENAMAR BENATTA and **bring him forthwith to the nearest magistrate judge** to answer an Indictment . . . ." (*See* Docket #40) (emphasis added). Hinton concluded this e-mail by asking Gromis what he thought of that suggestion especially since "at the very least, it probably saves [them] an identity hearing." (*See* Docket #13, ¶ 8 and e-mail printout attached to the Affidavit of Gromis). Assistant United States Attorney Gromis telephonically responded to Hinton's e-mail, the date being unknown, and advised that he "did not believe that the INS would favor such a procedure, and that [he] would prefer it if his [Hinton] office would go forward with a Rule 40 removal."[5] (*See* Docket #13, ¶ 8). Almost one month later, Assistant United States Attorney Gromis sent an e-mail on April 4, 2002 to Hinton inquiring as to how "[they] were doing on the Benatta Rule 40." (*See* Docket #13, ¶ 9 and e-mail printout attached to the Affidavit of Gromis). Hinton responded to this e-mail on April 8, 2002 by advising that the defendant was "scheduled to be arraigned on a removal complaint [on April 9, 2002]." (*See* Docket #13, ¶ 9 and e-mail printout attached to the Affidavit of Gromis). The defendant was taken before Magistrate Judge Chrein in the Eastern District of New York ("EDNY") on April 9, 2002 and arraigned on a removal complaint, and after being advised of his rights, the defendant waived an identity

[5] This statement also seems contrary to the procedure actually utilized by INS and the USMS in removing the defendant from the BFDF on September 16, 2001 and transporting him to the MDC Brooklyn and assigning a USMS number to him at that facility without a court order or writ.

hearing and was ordered committed to the WDNY. (*See* Docket #13 and copy of EDNY docket proceedings attached to the Affidavit of Gromis). It is also pointed out that the "Return" on the aforesaid "Warrant For Arrest" establishes that it was executed on April 9, 2002 by representatives of INS. (*See* Docket #40). However, for reasons not explained, the defendant was not removed from MDC Brooklyn until April 30, 2002 and transported to the WDNY for arraignment on the indictment notwithstanding that the INS removal proceedings had been completed by reason of the fact that "the BIA [had] dismissed [his] appeal from the IJ removal order" on April 8, 20002 thereby resulting in a "final removal order in defendant's removal proceeding." (*See* Docket #24, ¶ 15 and Exhibit D attached thereto).

DISCUSSION AND ANALYSIS

This case presents a "concatenation of events that borders on the bizarre." *United States v. Lai Ming Tanu*, 589 F.2d 82, 90 (2d Cir. 1978). The facts, as set forth above, require an analysis to be made based on separate and distinct principles of law as contained in the Fifth and Sixth Amendments to the United States Constitution ("Fifth and Sixth Amendments") as well as the statutory provisions set forth in the Speedy Trial Act ("STA"), 18 U.S.C. 3161 *et seq.* and Rule 48(b) of the Fed. R. Crim. P. in order to resolve defendant's motion to dismiss the indictment herein. This analysis shall separately address pre-indictment delay and post-indictment delay in the context of the Fifth and Sixth Amendments and the STA and Rule 48(b) of the Fed. R. Crim. P.

I. Pre-Indictment Delay:

The defendant was initially taken into administrative custody by representatives of the INS on September 12, 2001 and charged "as removable as an alien who had remained in the United States longer than authorized." (Docket #24, ¶¶ 7 and 8). Such action by the INS did not constitute an arrest. Civil deportation charges and deportation proceedings pursuant to 8 U.S.C. § 1252 have been classified as civil rather than criminal proceedings. *United States v. Cepeda-Luna*, 989 F.2d 353 (9th Cir. 1993). However, the defendant argues that notwithstanding the fact that he was initially taken into custody by the INS at the port of entry at the Rainbow Bridge in Niagara Falls, New York, he was interrogated by special agents of the FBI at that port, after allegedly having been advised of his rights pursuant to *Miranda (Miranda v. Arizona*, 384 U.S. 436 (1966)), about the alleged false identification documents found on him. This custodial interrogation by the FBI agents demonstrates, it is argued, that the defendant was in reality in the custody of the government and being detained on potential criminal violations and that the alleged INS civil charge and detention were merely a "ruse" so as to enable the FBI to hold and interrogate the defendant without charging him with a criminal offense.

> The fact that criminal authorities may have played some role in [the defendant's] initial detention does not necessarily mandate the application of the Speedy Trial Act to civil detentions.

Cepeda-Luna, 989 F.2d at 356.

But if it is determined that there has been collusion between INS officials and criminal authorities and the civil detention of the defendant is merely a ruse to avoid

the requirements of the STA, such civil detention triggers the thirty-day clock under the STA. *See* 18 U.S.C. § 3161(b); *Cepeda-Luna,* 989 F.2d at 354.

The bizarre events between September 12, 2001 and December 12, 2001 in this case would seem to supply credence to defendant's claim of "ruse" by the INS in conjunction with the actions of the FBI and the USMS. The defendant was served with an INS Notice to Appear thereby placing him in immigration proceedings on September 13, 2001. The defendant was transported to the BFDF in Batavia, New York, WDNY, an immigration holding center wherein two immigration courts are housed and two immigration judges assigned. Because the defendant was taken into civil custody on the immigration violation at the port of entry in Niagara Falls, New York, the WDNY was a proper venue for conducting the removal proceedings. *See* 8 C.F.R. §3.14(a); *La Franca v. Immigration and Naturalization Service*, 413 F.2d 686 (2d Cir. 1969). In fact, on September 13, 2001, the INS formally commenced a removal proceeding against the defendant at the BFDF Immigration Court, and the Notice to Appear served on him required him to appear in the Batavia Immigration Court on September 25, 2001. At that time, the defendant had not been given the opportunity to confer with counsel nor did he have counsel. The fact that the defendant was initially housed at the BFDF on September 12, 2001 and remained there until September 16, 2001 establishes that there was room available for him at this facility. On September 16, 2001, the defendant was taken into custody by the USMS and spirited off to the MDC Brooklyn. At the time of this "transfer" to the EDNY, no motion had been made or filed by either the INS or the defendant seeking a change of venue; nor any explanation given for this “transfer;” nor

has any explanation been given as to why the USMS transported the defendant to the MDC Brooklyn since he was an INS detainee. Apparently INS was attempting to justify this relocation by characterizing it as a change of venue for the removal proceeding. However, if that truly were the case, INS violated its own regulations wherein it is expressly provided:

> The Immigration Judge, **for good cause**, may change venue **only upon motion by one of the parties**, after the charging document has been filed with the Immigration Court. The Immigration Judge may grant a change of venue **only after the other party has been given notice and an opportunity to respond to the motion to change venue**.

8 C.F.R. 3.20(b). *See also* 8 U.S.C. § 1229(a)(2)(A) (emphasis added).

The motion for change of venue was not filed until September 21, 2001, five days after defendant's "transfer," and there is a question as to whether the defendant actually received this motion. The certificate of service states that the defendant "was personally served at **MDC NY**" whereas defendant was confined in SH at MDC **Brooklyn** (emphasis added) (*see* Docket #24, Exhibit A attached thereto).

The defendant rightly asserts that if he were truly being held in the custody of INS for purposes of proceeding with enforcement of the immigration laws and the holding of a removal hearing, this could easily have been accomplished at the BFDF. By not doing so, and instead, by spiriting him off to the MDC Brooklyn in the EDNY without a court order authorizing such "transfer" or change of venue on September 16, 2001, the defendant concludes that the government obviously had "ulterior motives"

especially when it placed him in SH in a BOP facility and classified him as being "high security" and assigning a USMS number to him. The damning evidence to support this claim is found in the admission of Michael D. Rozos, Director, Removals Division of the Immigration and Naturalization Service of the Department of Justice in Washington, D.C. wherein he states:

> In my examination of the documentation available at INS HQ/D&R relating to defendant, I did **not** come across **any documents** discussing the rationale for a change of venue. Likewise, Supervisory Deportation Officer James Creahan, Buffalo District offices, advises that **in a review of the full administrative file (A-file) he did not locate any documentation that discusses the rationale for a change of venue**.

Docket #24, ¶ 13 (emphasis added).

This absence of documentation **before** the removal of the defendant to the MDC Brooklyn in the EDNY justifies one in concluding that the government intentionally did not want to leave a "paper trail" regarding its actions and that the claim that defendant was being held for immigration removal proceedings and not for other purposes was a subterfuge. It is pointed out that MDC Brooklyn is a BOP facility and not an INS facility as is BFDF. The attempt by INS to "back fill" and attempt to correct its violation of 8 C.F.R. § 3.20 by filing a motion for a change of venue on September 21, 2001, some **five days after the fact**, constitutes the height of legal folly. Such action by the INS was a sham. It is also noted that the order of the IJ dated October 4, 2001 did **not** grant this motion *nunc pro tunc* to the date of September 16, 2001. (*See* Exhibit B attached to Docket #24). There is also a question of whether the defendant

was given an opportunity to respond to the change of venue motion as required by 8 C.F.R. § 3.20.

Nothing has been presented by the government to explain why it was necessary to not only remove the defendant to the MDC Brooklyn, but also why it was necessary to classify him as "high security" and place him in SH in a BOP facility for immigration removal purposes. It is pointed out that INS initially assigned an INS number to the defendant, to wit, A79-071-401. However, for reasons not explained by the government, when the defendant was detained at MDC Brooklyn, his INS number apparently was not utilized, but rather, he appears to have been assigned a USMS identification number, to wit, 51430-054. (See Exhibit C attached to Docket #34 which is described as "Department of Justice, Federal Bureau of Prisons Special Housing Report"). This number assignment would seem to indicate that the defendant was being held as a "criminal" detainee by the USMS rather than as a civil immigration detainee by the INS. It is also this Court's understanding that the INS does **not** classify its civil detainees as “high security” as was done in the case of the defendant while he was detained in the MDC Brooklyn. It also appears, based on the lack of the government’s response, that the defendant was held “incommunicado” and without counsel after being placed in SH at MDC Brooklyn on September 17, 2001 and continuously detained in SH under extremely harsh conditions[6] until April 30, 2002 when

[6] The April 2003 report of the Inspector General of the U.S. Department of (continued...)

he was finally returned to the BFDF. During his period of detention at the MDC Brooklyn, the defendant was interrogated by special agents of the FBI on at least five and perhaps six separate occasions, and as evidenced by the declaration of Special Agent Stephen Jennings, Jr., Acting Section Chief of the Counterterrorism Division's International Terrorism Operations Section ("ITOS") at FBI Headquarters in Washington, D.C. dated December 11, 2001, the defendant was "identified" by the FBI as an individual "whose activities warranted further inquiry." (Exhibit J attached to Docket #34 at page 2). There is no doubt in this Court's mind that the defendant, because of the fact that he was an Algerian citizen and a member of the Algerian Air Force, was spirited off to the MDC Brooklyn on September 16, 2001 and held in SH as "high security" for purposes of providing an expeditious means of having the defendant interrogated by special agents of the FBI's ITOS as a result of the horrific events of

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[6](...continued)
Justice entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" corroborates the allegations of the defendant as to the extremely harsh conditions under which he was held wherein it is stated:

> In the aftermath of the September 11 attacks, 184 aliens arrested on immigration charges were confined in high-security federal prisons, as opposed to less restrictive INS detention facilities. Eighty-four of these aliens were held at the MDC in Brooklyn, New York. These MDC detainees were held under "the most restrictive conditions possible," which included "lockdown" for at least 23 hours per day, extremely limited access to telephones, and restrictive escort procedures any time the detainees were moved outside their cells. To this end, the MDC created an ADMA SHU specifically to confine the September 11 detainees.

P. 157; *see also* pages 158, 160, 163, 164, 192, 193, 195 and 197.

September 11, 2001.

Admittedly, the defendant was initially in the lawful civil custody of the INS as a result of his illegal immigrant status in this country at the time, and it is conceded that the INS had the discretion to house the defendant at facilities of its choosing after taking the defendant into such custody and to thereafter process him in accordance with the immigration laws of the United States.

I am also of the opinion that because of the events of September 11, 2001, the FBI would have been derelict in its duty if it did not pursue an investigation of the defendant after the Canadian authorities contacted the U.S. officials on September 12, 2001. However, the events of September 11, 2001, notwithstanding the heinous and despicable nature of those events, do not constitute an acceptable basis for abandoning our Constitutional principles and rule of law by adopting an "end justifies the means" philosophy. It is in this context that the rights of the defendant must be evaluated. The previously-noted report of the Inspector General of the Department of Justice (*see* footnote #6) is critical of the FBI's method of handling the cases designated "September 11 Detainees," of which the defendant was one, wherein it is stated:

> The FBI's New York Field Office took an aggressive stance when it came to deciding whether any aliens arrested on immigration charges were "of interest" to its terrorism investigation. Witnesses both inside and outside the FBI told us that the New York FBI interpreted and applied the term "of interest" to the September 11 investigation quite broadly. Consequently, all aliens in violation of their immigration status that the JTTF encountered in the course of pursuing PENTTBOM leads - whether or not subjects of the leads -

> were arrested, classified as September 11 detainees and subjected to the full FBI clearance investigation, regardless of the factual circumstances of the aliens' arrest or the absence of evidence connecting them to the September 11 attacks or terrorism. This contrasted with procedures used elsewhere in the country, where aliens were assessed individually before being considered "of interest" to the terrorism investigation and therefore subject to the full FBI clearance investigations.
>
> Moreover, the FBI's initial "interest" classification **had an enormous impact on the detainees** because it determined whether they would be housed in a high-security BOP facility like the MDC or in a less restrictive setting like Passaic. In addition, the decision to label an alien a "September 11 detainee" versus a "regular immigration detainee" **significantly affected** whether bond would be available and **the timing of the detainee's removal or release**.

Pages 186-187 (emphasis added).

In concluding his Report, the Inspector General was critical of the Department of Justice's handling of the cases involving the "September 11 Detainees" wherein "the Department of Justice **used the federal immigration laws to detain aliens** who were suspected of having ties to the attacks or terrorism in general" and found that "the Department instituted a policy that these detainees would be held until cleared by the FBI." Pages 195-196 (emphasis added).

The FBI did not "clear" the defendant until sometime in November 2001 as established in an FBI 302 report dated November 15, 2001 wherein it is stated:

> Given the negative searches and after consultation with ASAC Kenneth Maxwell, FBI general counsel Hyon Kim (FBI HQ) and INS prosecuting attorney Ann Gannon the writer requests BENATTA be cleared of his involvement in the

captioned investigation.

Exhibit I attached to Docket #34.

Notwithstanding this aforesaid "clearance," the defendant continued to be held in SH as "high security" at the MDC Brooklyn until April 30, 2002 when he was transported by the USMS to the BFDF. (*See* Declaration of Michael Rozos, ¶ 18, Docket #24).

Based on the particular facts of this case, it is reasonable to conclude that as of September 16, 2001, the defendant was **primarily** under the control and custody of the FBI when he was spirited off to the MDC Brooklyn and placed in SH as "high security." It is apparent that the transportation from the BFDF to the MDC Brooklyn and the detention of the defendant in SH were in fact orchestrated by the FBI for purposes of investigating whether the defendant was involved in terrorist activity. It is also reasonable to conclude that the defendant remained in such FBI custody at least until November 15, 2001 and more probably until
April 2002. To accept and adopt the argument put forth by the government in response to the defendant's motion to dismiss the indictment, that the defendant was being detained by the INS for the purpose of conducting removal proceedings would be to join in the charade that has been perpetrated. The INS had the defendant in custody at the BFDF, an immigration detention facility, and had undertaken removal proceedings against the defendant in the WDNY on
September 13, 2001. Immigration Judge Reid, sitting in Batavia, New York, had

apparently been assigned this removal proceeding which had been "scheduled for a master calendar hearing on September 25, 2001 at the BFDF." (*See* Exhibit D, ¶ 2 attached to Docket #34).

It is also reasonable to conclude that since the FBI was now exercising dominion and control over the defendant as of September 16, 2001 and causing him to be held in SH with the designation "high security," it in essence "arrested" the defendant for purposes of conducting a **criminal** investigation of him. The INS **facilitated** this custodial detention and investigation. Whether such facilitation constitutes a "ruse," as claimed by the defendant, does not have to be determined at this time for the reasons and recommendations hereinafter made.[7] However, there is no doubt in this Court's opinion that the facts of this case clearly establish that there was collusion between the INS and the FBI in the treatment of the defendant.

A. The Fifth Amendment Due Process Claim

The Fifth Amendment to the United States Constitution expressly provides in part:

> No person shall be **held** to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . , nor be deprived of life, **liberty**, or property, without due process of law. . . . (emphasis added).

[7] Should the District Judge not accept this Court's recommendation to dismiss the indictment herein, it is further recommended that the matter be returned to this Court for purposes of holding a hearing on the issue of whether the lengthy "civil" detention was in fact a ruse by the INS or constituted "bad faith" on the part of the government.

The government argues that the defendant's motion to dismiss the indictment based on his claim of denial of due process under the Fifth Amendment must be denied because the defendant has failed to establish prejudice which is a prerequisite for such relief as set forth in case law and since the indictment in this case was returned within the allowable statute of limitations period for the charges therein, the defendant has no legal basis to warrant a dismissal of the indictment. It has been held that:

> [O]nly government conduct that "shocks the conscience" can violate due process. *United States v. Chin*, 934 F.2d 393, 398 (2d Cir. 1991) (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L.Ed. 183 (1952). . . . The paradigm examples of conscience-shocking conduct are egregious invasion of individual rights.

United States v. Rahman, 189 F.3d 88, 131 (2d Cir. 1999).

However, the Court of Appeals for the Second Circuit has also held that:

> An indictment brought within the time constraints of the statute may nevertheless violate due process where pre-indictment delay has been shown to cause 'substantial prejudice' to the defendant's ability to present his defense and 'the delay was an intentional device to gain [a] tactical advantage over the accused.' [*United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455 (1971)]. As the Supreme Court further has explained, where delay prejudices the presentation of a defense and is engaged in for an improper purpose it violates the Due Process Clause because such conduct departs from the fundamental notions of 'fair play.' *United States v. Lovasco*, 431 U.S. 783, 795, 97 S. Ct. 2044, 52 L.Ed.2d 752 (1977). A defendant bears the 'heavy burden' of proving both that he suffered actual prejudice because of the alleged pre-indictment delay *and* that such delay was a course intentionally pursued by the government for an improper purpose. *See United States v. Scarpa*, 913 F.2d 993, 1014 (2d Cir. 1990); *United States v. Hoo*, 825

F.2d 667, 671 (2d Cir. 1987).

> Prejudice in this context has meant that sort of deprivation that impairs a defendant's right to a fair trial. *See United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir. 1979). This kind of prejudice is commonly demonstrated by the loss of documentary evidence or the unavailability of a key witness. *See e.g. Lovasco*, 431 U.S. at 796, 97 S. Ct. 2044. . . .

United States v. Cornielle, 171 F.3d 748, 752 (2d Cir. 1999).

I do not find anything in the present record that would support a finding that the delay in indicting the defendant herein was caused so as to "gain a tactical advantage over the accused" or that such delay has caused the "loss of documentary evidence or the unavailability of a key witness." As a result, it cannot be said that the defendant's rights under the Due Process Clause of the Fifth Amendment have been violated under those circumstances. The difficult question is whether the investigation tactics employed by the FBI with the collusion of INS constitute an "improper purpose" because "such conduct departs from fundamental notions of fair play" and therefore constitutes a violation of Due Process. This Court recognizes that the events of September 11, 2001 necessitated extraordinary action by the government in order to prevent further harm and acts of terrorism and to apprehend all those who had involvement in those despicable acts. Once again, however, under our Constitution, absent due process, the end cannot justify the means no matter how well or good intentioned the parties may be, for as the old adage teaches, "the road to hell is paved with good intentions." Holding the defendant for a reasonable period of time in order to determine if he was involved in terrorism was justified, especially considering the circumstances of September 11, 2001 and the fact that he is an Algerian citizen in the

Algerian Air Force and was attempting to leave this country and enter Canada on September 5, 2001. Although this may have smacked of "profiling," common sense dictated that the defendant be investigated in light of the circumstances. What I do find to be most troubling, however, is the prosecution's attempt to put a "spin" on what was done

in this case by asserting that at all times the defendant was in the legal custody of the INS and was being held for the purpose of enforcing the immigration laws of the United States. The facts of this case belie that assertion. Nevertheless, for the reasons hereinafter stated, I find that it is not necessary to answer this perplexing question of whether the actions of the INS and the FBI in their treatment of the defendant were taken for an "improper purpose" so as to cause a finding that the Due Process Clause of the Fifth Amendment was violated. The basic issue herein is better addressed under the principles of the Sixth Amendment and the Speedy Trial Act as well as Rule 48(b) Fed. R. Crim. P.

B. The Sixth Amendment Speedy Trial Claim:

The language of the United States Supreme Court in *Doggett v. United States*, 505 U.S. 647 (1992) is most applicable to the factual circumstances in the case at hand and therefore, brevity will be sacrificed intentionally by setting it forth at length:

> We have observed in prior cases that unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including "**oppressive pretrial incarceration**," "anxiety and concern of the accused," and

"the possibility that the [accused's] defense will be impaired" by dimming memories and loss of exculpatory evidence. [*Barker v. Wingo*, 407 U.S. 514, 532, 92 S. Ct. 2182, 2192, 33 L.Ed.2d 101 (1972)]; *see also Smith v. Hooey*, 393 U.S. 374, 377-379, 21 L.Ed.2d 607, 89 S. Ct. 575 (1969); *United States v. Ewell*, 383 U.S. 116, 120, 15 L.Ed.2d 627, 86 S. Ct. 773, 776 (1966).

* * *

Barker stressed that official bad faith in causing delay will be weighed heavily against the government, 407 U.S. at 531, 92 S. Ct. 2182. . . . Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him . . . . *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. *Ibid*. Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, *cf. Arizona v. Youngblood*, 488 U.S. 51, 101 L.Ed.2d 281, 109 S. Ct. 333 (1988), and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the government attaches to securing a conviction, the harder it will try to get it. *Id*. at 654, 656-57 (emphasis added).

The view expressed by Justice Thomas in his dissenting opinion in

Doggett, which was joined in by Chief Justice Rehnquist and Justice Scalia is most applicable to the defendant's case wherein he stated:

> We have long identified the "major evils" against which the Speedy Trial Clause is directed as "**undue and oppressive incarceration**" and the "anxiety and concern accompanying public accusation." *United States v. Marion*, 404 U.S. 307, 320, 20 L.Ed.2d 468, 92 S. Ct. 455, 463 (1971) p. 659. "[These] two concerns lie at the heart of the Clause . . . .
>
> * * *
>
> "[T]he Speedy Trial Clause's core concern is impairment of *liberty*." United States v. Loud Hawk, 474 U.S. 302, 312, 88 L.Ed.2d 640, 106 S. Ct. 648, 654 (1986) . . . . The Clause is directed not generally against delay-related prejudice, but against delay-related prejudice to a defendant's **liberty**. "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial . . . ." (emphasis added) (internal citations omitted).

Id. at 659-661.

The defendant in this case undeniably was deprived of his "liberty" and held in custody under harsh conditions which can be said to be "oppressive." (*See* Inspector General's Report - "The September 11 Detainees," *supra,* fn. 6; Docket #34, ¶ 48). This period of harsh detention had been in effect for approximately three months before the present indictment was returned against the defendant on December 12, 2001. Notwithstanding the fact that the defendant was in the government's custody, either by way of the INS, the FBI or the USMS, and a warrant for his arrest had been issued by this Court on December 12, 2001 at the request of the government, and that the defendant had been "cleared" by the FBI of terrorist activity in November 2001, the

defendant was not brought before a magistrate judge for arraignment on this indictment until April 30, 2002. More disconcerting is the fact that the defendant was kept at the MDC Brooklyn in SH until April 30, 2002 under the same harsh conditions notwithstanding his "clearance" by the FBI in November 2001.

To accept the government's argument that the defendant has not been "prejudiced" in this case or that the defendant has failed to establish "prejudice" would be to deny reality and the very "core concern" of the Sixth Amendment. To be kept in "lockdown" in SH at the MDC Brooklyn, under the oppressive conditions described in the Inspector General's Report on "The September 11 Detainees" for more than seven months under the factual circumstances of this case, certainly constitutes the "undue and oppressive incarceration" the Sixth Amendment is meant to prevent.[8]

The explanation for the delay in returning the defendant to the WDNY and not arraigning him on the indictment until April 30, 2002 does not establish a legitimate justification for such delay but rather demonstrates incompetence and negligence on the part of the government's counsel.[9] It also contradicts the argument put forth by the government in justifying the removal of the defendant from the BFDF on September 16, 2001 and spiriting him off to the MDC Brooklyn. More specifically, the government

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[8] It is noted that under the Federal Sentencing Guidelines, the defendant's guideline range is zero to six months and therefore, he was and is eligible for probation. As a result, custodial detention in SH at the MDC Brooklyn for the period December 12, 2001 to April 30, 2002 could be said to have unnecessarily deprived him of his liberty.

[9] *See* Docket #13.

argues that since the defendant had been taken into custody by the INS on September 12, 2001 as an illegal alien, it had the right to transport and house him anywhere the INS deemed appropriate and that it was not necessary to have a court order or any other type of judicial authorization for such removal and relocation. If that is the case, why was it necessary for the government to file a "removal complaint" or consider using a "writ" to bring the defendant back to the WDNY and house him in the BFDF? Using the authority postulated by the government, the INS did not need any order or judicial authorization in order to relocate or re-transport the defendant to the BFDF. Assistant United States Attorney Gromis merely had to request that such return of the defendant be effectuated since it has been established that Gromis was working with Larry Krug, the INS case agent in Buffalo for this very purpose when he "provided a copy of the [arrest] warrant" to him for the arrest of the defendant on the indictment herein. Upon such return to the WDNY under the custody of INS on the immigration charge, the defendant could have easily been brought before this Court for arraignment on the indictment. In any event, it is emphasized that Rule 40, Fed. R. Crim. P. proceedings are not complex and the mandate of the Rule is quite clear, to wit:

> If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken **without unnecessary delay** before the nearest available federal magistrate judge, in accordance with the provisions of Rule 5. (emphasis added).[10]

It is noted that Assistant United States Attorney Gromis, in his Affidavit

[10] This was the Rule in effect in December 2001 and January through November 2002.

sworn to August 28, 2002, paragraph 4 (Docket #13), states that he "provided a copy of the [arrest] warrant to the **INS case agent** in Buffalo, Larry Krug, and asked him to lodge it as a detainer against the defendant, who was in custody at the Metropolitan Detention Center in Brooklyn in the Eastern District of New York." Since the defendant was already in the custody of the INS, and it now had an arrest warrant for the defendant, I fail to see why that warrant could not have been executed immediately and the defendant brought "forthwith" to the nearest magistrate judge. (*See* Docket #40). The explanations set forth in the attached e-mail printouts to the Gromis affidavit (Docket #13) border on ridiculousness. For two supposedly experienced Assistant United States Attorneys to debate on how to return an indicted defendant from the custodial district to the charging district for a period of approximately four months is ludicrous. Furthermore, Gromis's assertion that he "did not immediately commence action to bring the defendant to Buffalo" because he "had been informed by the INS that the defendant was involved in INS removal proceedings at that time in New York City" rings hollow. (Docket #13, ¶ 5). The INS removal hearing had been completed on December 12, 2001 and an order of removal issued on that date. (*See* Docket #24, ¶ 14 and Exhibit C attached thereto). Admittedly, the defendant filed an appeal from this order of removal to the Board of Immigration Appeals ("BIA") on January 4, 2002, but there was no legal requirement to hold the defendant at the MDC Brooklyn while this appeal was pending or to keep him at any facility in the New York City area. The INS appeal process could just as easily have been completed while the defendant was detained at the BFDF as so often happens. This BIA appeal was certainly not a legal impediment to the execution of the aforesaid arrest warrant and appearance before a

magistrate judge.

Nevertheless, "on April 8, 2002 the BIA dismissed defendant's appeal from the IJ removal order" (*see* Docket #24, ¶ 15 and Exhibit D attached thereto) and the arrest warrant was executed on April 9, 2002 by representatives of INS and the defendant was "arrested by INS Brooklyn, N.Y." on April 9, 2002. (*See* Docket #40). I find it curious that INS agents executed the arrest of the defendant on **non-INS** charges, but nevertheless, such action further buttresses this Court's opinion that the defendant could have easily been returned to the WDNY in December 2001 and certainly no later than January 14, 2002 by the INS.

Because the government contends that the defendant was always in the custody of INS since his "civil arrest" on September 12, 2001, and since INS Agent Krug had been given the arrest warrant for the arrest of the defendant on the indictment on or about December 12, 2001, I consider the defendant to have been constructively arrested on the indictment on or about December 12, 2001 by reason of his confinement at the MDC Brooklyn in SH as "high security" under the alleged custody of the INS. As a result, the defendant should have been "taken **without unnecessary delay** before the nearest available federal magistrate judge" pursuant to Rule 40 of the Fed. R. Crim. P. By not doing so, and keeping the defendant detained in the MDC Brooklyn, SH without bail or affording him an opportunity to apply for bail, constituted "delay-related prejudice to [his] liberty" which rose to the level of violating his Sixth

Amendment right to a speedy trial. This type of government malfeasance or negligence should not be tolerated since it "falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying" the criminal prosecution of the defendant. *Doggett, supra*. As a result, it is recommended that defendant's motion to dismiss the indictment be granted on this ground.

C. The Speedy Trial Act Claim:

If the District Judge elects not to accept the recommendation of this Court to dismiss the indictment on Sixth Amendment grounds, it is submitted that the defendant's motion to dismiss should be granted on the basis that the government, under the **specific** and **bizarre** facts of this case, failed to comply with the requirements of the Speedy Trial Act ("STA"), 18 U.S.C. § 3161(c)(1).

> Title 18 U.S.C. § 3161(c)(1) provides:
>
> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense **shall** commence within **seventy** days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. (emphasis added).

The government argues that the STA has not been violated since the defendant did not appear before this Court for arraignment on the indictment until April

30, 2002 at which time he entered a plea of not guilty to the charges and therefore, the "seventy day" period under 18 U.S.C. § 3161(c)(1) did not commence to run until that date. This particular posturing by the government not only attempts to place form over substance, it also constitutes a bootstrapping argument of the most discreditable kind and is nothing more than sophistry. By its very actions in keeping the defendant detained in SH at the MDC Brooklyn from December 12, 2001 until April 30, 2002, the defendant, through no fault of his own, was prevented from appearing sooner before this Court for arraignment on the indictment which was filed and made public on December 12, 2001. The very purpose of the STA would be defeated if the government is allowed to prevent the arraignment of the defendant by holding him in its custody and at the same time claim that the speedy trial clock has not started because the defendant has not been arraigned. The provision set forth in 18 U.S.C. § 3161(c)(1) as to when the seventy day period commences is meant to apply to those circumstances wherein the defendant is not available for arraignment after an indictment has been returned and filed or where the defendant has caused the delay in his arraignment. That is not the case before this Court. Because the defendant was in the control and custody of the government on December 12, 2001 and therefore available for arraignment on the indictment, the government cannot utilize the actual arraignment date to justify its inaction in this case. Such delay has not only caused "prejudice" to the defendant for the reasons set forth above, it has denied him his rights as provided under the STA.

Admittedly, a formal plea of not guilty to the charges in the indictment had not been entered until his arraignment on April 30, 2002. Nevertheless, the defendant

is presumed innocent of these charges and such presumption of innocense which existed from December 12, 2001 equates to a plea of not guilty to the charges herein for purposes of this analysis.

> The principle that there is a presumption of innocense in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Coffin v. United States, 156 U.S. 432, 453 (1895); *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

This Court finds that the defendant could have easily been returned to the WDNY and arraigned on the present indictment by January 14, 2002 even if it were necessary to have done so pursuant to Rule 40 of the Fed. R. Crim. P. Using this January 14, 2002 date, another 105 days elapsed before the defendant was returned to the WDNY and arraigned on the indictment. As a result, the defendant was subjected to oppressive pretrial incarceration which constitutes prejudice as a result of the government's failure to have him promptly arraigned on the indictment. *Doggett v. United States, supra.* Such delay should not be tolerated and therefore, an appropriate remedy for this violation is dismissal of the indictment. *See* 18 U.S.C. § 3162(a)(2).

> Regardless of the defendant's guilt or innocense, courts are permitted to exercise the power of dismissal against the wishes of the prosecutor when there is a failure to prosecute that is unjustified either because of the literal application of the statute or because of a showing of prejudice to the accused or an intentional delay by the prosecution to effect such prejudice.

United States v. Lai Ming Tanu, 589 F.2d 82, 87 (2d Cir. 1978).

Notwithstanding the decisions in *United States v. Lai Ming Tanu, supra*, *United States v. Lainez-Leiva*, 129 F.3d 89 (2d Cir. 1997) and *United States v. Jones*, 129 F.3d 718 (2d Cir. 1997), the unique and bizarre facts of this case cause me to conclude that support for this finding is found, by analogy, in the provisions of 18 U.S.C. § 3161(j)(1), (2) and (3). 18 U.S.C. § 3161(j)(1), (2) and (3) provide as follows:

> (j)(1) If the attorney for the government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall **promptly** -
>
> * * *
>
> (B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.
>
> 2. If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the government who caused the detainer to be filed.
>
> 3. Upon receipt of such notice, the attorney for the government **shall promptly** seek to obtain the presence of the prisoner for trial. (emphasis added).

Logic dictates that the defendant, who was held in the custody of the government in a BOP facility in SH for purposes of allegedly being deported pursuant to the immigration laws of the United States, should have been notified that criminal

charges had been filed against him and that he had a right to demand a trial on such charges. Assistant United States Attorney Gromis caused a "detainer" to be filed against the defendant by providing the warrant for the arrest of the defendant to INS case agent Larry Krug on December 12, 2001 and asking him "to lodge it as a detainer against the defendant." (Docket #13, ¶ 4). It appears from a reading of the record and the submissions made in this case, that the defendant had not been advised **promptly** of the indictment against him and his right to demand a trial. In fact, it appears to this Court that the defendant was never advised of the indictment until his appearance before the magistrate judge in the EDNY on April 9, 2002 when he was ordered returned to the WDNY. Holding the defendant in SH at MDC Brooklyn under harsh and oppressive conditions for a period of approximately 138 days before having him arraigned on the indictment constitutes a violation of the STA and therefore, it is RECOMMENDED that the indictment herein be dismissed pursuant to 18 U.S.C. § 3162(a)(2).

D. Dismissal Pursuant to Rule 48(b) Fed. R. Crim. P.:

Rule 48(b) of the Fed. R. Crim. P. provides as follows:

> The court may dismiss an indictment, information, or complaint if **unnecessary** delay occurs in:
>
> * * *
>
> 3. Bringing a defendant to trial (emphasis added).

See also United States v. Marion, 404 U.S. 307, 319 (1971).

Arraignment of a defendant on the indictment is the initial step necessary for bringing a defendant to trial when an indictment has been returned by a grand jury. *See* Rule 10, Fed. R. Crim. P. For the reasons previously set forth, the delay in arraigning the defendant on the indictment was absolutely **unnecessary**. Furthermore, even if it were concluded that such delay did not rise to the level of a violation of the Sixth Amendment right to a speedy trial, or to a violation of the STA, the Court nevertheless has authority under Rule 48(b) Fed. R. Crim. P. to dismiss the indictment herein. As the Court of Appeals for the Fourth Circuit has held:

> [Rule 48(b) of the Fed. R. Crim. P.] not only allows a court to dismiss an indictment on constitutional grounds, *see Pollard v. United States*, 352 U.S. 354, 361, n. 7, 77 S. Ct. 481, 1L.Ed.2d 393 (1957) (noting that Rule 48(b) provides for enforcement of the Sixth Amendment's speedy-trial right), but it also restates the court's inherent power to dismiss an indictment for lack of prosecution where the delay is not of a constitutional magnitude, *see* Fed.R.Crim.P. 48(b) advisory committee note (pointing out that the rule restates 'inherent power of the court to dismiss a case for want of prosecution').

United States v. Goodson, 204 F.3d 508, 513 (4th Cir. 2000).

Therefore, because of the prejudice that the defendant has suffered by reason of his confinement at the MDC Brooklyn, it is RECOMMENDED that the indictment herein be dismissed with prejudice pursuant to Rule 48(b) Fed. R. Crim. P. if it is not dismissed pursuant to the Sixth Amendment or the STA.

E. Defendant's Motion To Suppress Evidence:

The defendant moved to suppress any statements made by him to the various FBI agents who interrogated him during the period of September 12, 2001 through November 2001. The government has represented that it "does not intend to offer any . . . statements [of the defendant] at the defendant's trial during its case-in-chief." (*See* Government Response to Defendant's Motion, Docket #12, page 1). As a result of this representation, the defendant's motion to suppress should be denied on the basis that it is moot.

CONCLUSION

Based on the foregoing, it is hereby RECOMMENDED that the defendant's motion to dismiss the indictment be GRANTED and that the indictment be dismissed with prejudice and that the defendant's motion to suppress evidence be DENIED on the basis that it is moot.

Therefore, it is hereby **ORDERED** pursuant to 28 U.S.C. § 636(b)(1) that:

This Report, Recommendation and Order be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report, Recommendation and Order must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report, Recommendation and Order in accordance with the above statute, Fed.R.Civ.P. 72(b) and Local Rule 72.3(a)(3).

The District Judge will ordinarily refuse to consider *de novo*, arguments, case law and/or evidentiary material which could have been, but were not presented to the magistrate judge in the first instance. *See, e.g., Patterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988). **Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Judge's Order.** *Thomas v. Arn*, 474 U.S. 140 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Decision and Order), may result in the District Judge's refusal to consider the objection.**

The Clerk is directed to send a copy of this Report, Recommendation and Order to the attorneys for the parties.

_____
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge

DATED: Buffalo, New York
September 12 , 2003